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No. 84-1580

In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH INADI

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the Confrontation Clause bars the prosecution from introducing statements falling within the co-conspirator exception to the hearsay rule (Fed. R. Evid. 801(d)(2)(E)) unless it establishes that the declarant is unavailable to testify at trial.

2. Whether, if the court of appeals was correct that proof of unavailability is required, it should have ordered a remand hearing to determine the question of unavailability rather than ordering a new trial.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 748 F.2d 812. The order amending that opinion (Pet. App. 17a-19a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on November 13, 1984. The order denying rehearing was entered on February 8, 1985 (Pet. App. 20a). The petition for a writ of certiorari was filed on April 4, 1985, and was granted on May 28, 1985. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

The Sixth Amendment provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him * * *.

Rule 301(d) of the Federal Rules of Evidence provides in pertinent part:

> A statement is not hearsay if—
>
> * * * * *
>
> (2) * * * The statement is offered against a party and is * * * (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Pennsylvania, respondent was convicted on six counts arising from a scheme to manufacture and distribute methamphetamine. He was sentenced to three years' imprisonment to be followed by a seven-year special parole term. The court of appeals reversed (Pet. App. 1a-16a).

1. The evidence at trial showed that in September 1979 unindicted co-conspirator Michael McKeon approached respondent seeking a distribution "outlet" for methamphetamine. The two men agreed that respondent would supply cash and chemicals for the venture and would also be responsible for distribution, while McKeon and co-conspirator William Levan would actually manufacture the drug (Tr. 77-83, 93).

McKeon and Levan made three attempts to manufacture methamphetamine in Philadelphia between December 1979 and April 1980. On the first occasion, McKeon made three pounds of methamphetamine using P-2-P, a precursor chemical, supplied by respondent. This methamphetamine was delivered to respondent. McKeon, Levan, and respondent shared a profit of $19,500 on this transaction. The second "cook" failed to produce methamphetamine because a necessary ingredient supplied by respondent turned out to be a substance other than P-2-P. A third "cook" succeeded in producing three and one-half pounds of methamphetamine, which Levan delivered to respondent (Tr. 83-93).

Thereafter, McKeon went to Cape May, New Jersey, with the liquid residue from the third "cook." He met respondent, Levan, co-conspirator John Lazaro, as well as two others not named as co-conspirators, at an empty house that McKeon believed had been rented through Lazaro. There they attempted to extract additional methamphetamine from the liquid residue. This "drying" resulted in less than an ounce of low quality product, which McKeon promptly sold for $200 (Tr. 95).

In the early morning hours of May 23, 1980, two local police officers, acting pursuant to a search warrant, surreptitiously entered the Cape May house and removed a tray covered with drying methamphetamine. With the permission of the issuing magistrate, the officers delayed returning an inventory, leaving the participants to speculate about what had happened to the missing tray (Tr. 257-260, 275, 299-300).

On May 25, 1980, two DEA agents observed a meeting between respondent and Lazaro alongside Lazaro's car in the parking lot of a restaurant in Philadelphia. At one point, one of the agents observed respondent lean into the car. After Lazaro drove off, the agents overtook and stopped his car. They searched the car, as well as Lazaro and his wife Marianne, who was a passenger at the time. Finding nothing, the agents allowed the Lazaros to leave. Marianne Lazaro later recounted that during the search she threw away a clear plastic bag containing white powder that her husband had handed to her after the meeting with respondent. Eight hours after the search, one of the agents returned to the scene of the stop and found a clear plastic bag containing a small quantity of methamphetmine (Tr. 361, 432-439, 472-485, 555-556).[1]

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[1] Marianne Lazaro, who was named as an unindicted co-conspirator and who testified for the government under a grant of use immunity, denied that the bag found by the agent was the same one that her husband had given her (Tr. 505-506).

From May 23 to May 27, 1980, state officers lawfully intercepted five telephone conversations between various participants in the conspiracy. These taped conversations were played for the jury at trial. In one conversation, Lazaro asked respondents, in code, for a quantity of methamphetamine and reported on the residue missing from the Cape May house, suggesting that "Mike" probably took it. In another conversation, Lazaro and respondent arranged the meeting in the parking lot. In a third conversation, Lazaro reported to respondent that he kicked a "piece" under his car during the May 25 stop by the DEA agents, and he wondered how the agents were tipped off. (GX 8-10).

In a fourth conversation, between McKeon and Marianne Lazaro, the latter described the May 25 incident and suggested that respondent might have set them up. McKeon assured her that respondent was not an informant. In the final intercepted conversation, Levan and John Lazaro discussed the missing residue and speculated about who had set Lazaro up for the May 25 stop. (GX 13-14).

2. At trial, respondent sought to exclude the recorded statements of John Lazaro and the other co-conspirators on the ground that the statements did not satisfy the requirements of Fed. R. Evid. 801(d)(2)(E), which regulates admission of co-conspirator declarations. The court deferred ruling on this issue until after hearing the evidence (see J.A. 16); it then admitted the statements, finding that a preponderance of the evidence established that the statements were made by conspirators in furtherance of and during the course of the conspiracy (J.A. 21).

Respondent also objected to the admission of the statements on Confrontation Clause grounds, contending that the government had the burden of showing that the declarants were unavailable (J.A. 17). In response, the prosecutor informed the court that Lazaro had advised her personally that he would refuse to testify even if held in contempt. Nevertheless, at the judge's suggestion,

the prosecutor promised to bring Lazaro to court. The judge also asked defense counsel whether she wanted the prosecution to call Lazaro, since this might result in his testifying, and defense counsel stated that she would discuss this "weighty matter" with her client (J.A. 18). The government subpoenaed Lazaro (see Pet. App. 15a), but he failed to appear, advising the prosecutor that he had "car problems" (J.A. 19). The defense did not subpoena Lazaro, seek the issuance of a bench warrant, or (as far as the record indicates) make any other efforts to secure Lazaro's presence in court.

The court ultimately rejected all of respondent's Confrontation Clause objections. It noted (J.A. 21) that two of the four co-conspirator declarants (Mrs. Lazaro and McKeon) had testified and that the third (Levan) had asserted his Fifth Amendment privilege outside the presence of the jury. The court then implicitly rejected respondent's contention that the government was obligated to produce Mr. Lazaro or prove his unavailability. Lazaro's statements were admissible, the court held (J.A. 21), simply because they satisfied the co-conspirator rule.

3. On appeal, respondent reiterated his contention that the admission of John Lazaro's recorded statements violated both the co-conspirator exception to the hearsay rule and the Confrontation Clause. The court of appeals held that Lazaro's statements satisfied the requirements of the co-conspirator rule (Pet. App. 8a-11a). However, the court accepted respondent's contention that the Confrontation Clause requires the government to show the unavailability of a non-testifying co-conspirator as a precondition to admitting his out-of-court statements (*id.* at 11a-13a).

In imposing an "unavailability" requirement under the Confrontation Clause, the court relied almost exclusively (Pet. App. 12a) on this Court's dictum in *Ohio* v. *Roberts*, 448 U.S. 56, 65 (1980), that "in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case * * * the prosecution must either produce,

or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." The court of appeals found no reason for excepting co-conspirator statements from "the clear constitutional rule laid down in *Roberts*" (Pet. App. 12a). The court added (*id.* at 13a) that "it does not seem unreasonable to require the government to demonstrate that its hardship is real before availing itself of this tremendous evidentiary advantage."

The court rejected the government's argument that Lazaro's unavailability had in fact been sufficiently established, suggesting that the government should have requested a bench warrant to secure Lazaro's presence after he failed to obey the subpoena (Pet. App. 13a-16a). The court declined to credit the government's representation that Lazaro would refuse to testify and insisted that nothing less than "an actual assertion of privilege and exemption by ruling of the court" would suffice (*id.* at 16a). Respondent's convictions were reversed, and the case was remanded for a new trial (*ibid.*).

INTRODUCTION AND SUMMARY OF ARGUMENT

I.

Under common law, hearsay evidence was generally inadmissible, but exceptions to this rule for specific categories of hearsay were always recognized. Over the years, these exceptions were forged by litigation, examined by scholars and legislators, and modified in light of ongoing experience and study. The provisions of the Federal Rules of Evidence dealing with hearsay represent a codification and refinement of the common law approach: hearsay is generally made inadmissible (Rule 802), but there are more than 30 exemptions and exceptions (Rules 801(d), 803, 804). One of these exemptions, Rule 801(d)(2)(E), codifies the common law rule (which this Court adopted more than 150 years ago) permitting the admission of statements made by a co-conspirator during and in furtherance of the conspiracy.

This ancient and highly developed scheme for regulating the admission of hearsay has been thrown into confusion in recent years as a result of claims made by criminal defendants that the introduction of hearsay admissible under long accepted common law rules nevertheless violated their Sixth Amendment right "to confront the witnesses against" them. Because the co-conspirator rule is apparently the most frequently used exception to the hearsay rule,[2] the bulk of the lower court litigation has concerned co-conspirator declarations, and the courts of appeals are in sharp conflict regarding the effect of the Confrontation Clause on this rule. While some circuits have held that statements falling within the co-conspirator rule automatically satisfy the Confrontation Clause,[3] other circuits, including the Third Circuit, whose decision is now before the Court, have held that co-conspirator statements are barred by the Confrontation Clause unless the government (a) produces the declarant or establishes that he is unavailable and (b) establishes that the particular statements at issue are reliable.[4] In addition, several courts of appeals

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[2] See 4 D. Louisell & C. Mueller, *Federal Evidence* § 427, at 331 (1980).

[3] *E.g.*, *Boone* v. *Marshall*, 760 F.2d 117 (6th Cir. 1985); *United States* v. *Molt*, 758 F.2d 1198 (7th Cir. 1985); *Ottomano* v. *United States*, 468 F.2d 269, 273 (1st Cir. 1972), cert. denied, 409 U.S. 1128 (1973). See *United States* v. *Wolfe*, No. 84-9009 (11th Cir. July 29, 1985), slip op. 5544 (co-conspirator statements presumptively reliable; issue of declarants' availability not presented).

[4] In addition to the instant case, see *United States* v. *Caputo*, 758 F.2d 944 (3d Cir. 1985) (availability); *United States* v. *Ammar*, 714 F.2d 238, 254-257 (3d Cir. 1983), cert. denied, 464 U.S. 936 (1983) (reliability); *United States* v. *DeLuna*, 763 F.2d 897 (8th Cir. 1985); *United States* v. *Ordonez*, 737 F.2d 793, 802-804 (9th Cir. 1984); *United States* v. *Tille*, 729 F.2d 615, 620-621 (9th Cir. 1984), cert. denied, Nos. 83-6907, 83-6978 (Oct. 1, 1984).

The Second and Tenth Circuits appear to take an intermediate position, *i.e.*, that whether or not the co-conspirator declarant is available, the Confrontation Clause demands that the trier of fact have an adequate basis for judging reliability. See *United States*

have held that the Confrontation Clause imposes similar requirements as prerequisites for admission of evidence falling within other traditional hearsay exceptions.[5]

We find it hard to understand, nearly two hundred years after the adoption of the Sixth Amendment, what sudden epiphany could provide a supportable basis for the conclusion that the Constitution has been routinely violated under settled past practice. In our view, this reevaluation of traditional hearsay exceptions under the Confrontation Clause is unwarranted by the purposes of the Clause, which was primarily intended to prohibit trial by affidavit or deposition and analogous practices and was not meant to furnish a standard for close regulation of all traditional hearsay exceptions.

1. The hearsay rule, which has never been without exceptions, developed during the same general period as the right to confrontation, but they were doctrinally discrete. The hearsay rule, which applies both to criminal and civil trials, provided detailed regulation of the admission of out-of-court statements, while the right to confrontation developed in specific response to the hated 17th century practice of trying criminal defendants based on affidavits and depositions obtained ex parte by ex-

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v. *Perez*, 702 F.2d 33 (2d Cir. 1983) (adding that co-conspirator statements are usually reliable because they are against penal interest), cert. denied, 462 U.S. 1108 (1983); *United States* v. *Wright*, 588 F.2d 31, 37-38 (2d Cir.), cert. denied, 440 U.S. 917 (1979); *United States* v. *Alfonso*, 738 F.2d 369 (10th Cir. 1984); *United States* v. *Roberts*, 583 F.2d 1173, 1175-1176 (10th Cir. 1978), cert. denied, 439 U.S. 1080 (1979).

Fourth and Fifth Circuit precedent on this point are unclear. Compare *United States* v. *Lisotto*, 722 F.2d 85, 88 (4th Cir. 1983), cert. denied, No. 83-1417 (Mar. 26, 1984), with *United States* v. *Lurz*, 666 F.2d 69, 80-81 (4th Cir. 1981), cert. denied, 458 U.S. 1005 (1982); see *United States* v. *Peacock*, 654 F.2d 339, 349 (5th Cir. 1981), cert. denied, 464 U.S. 965 (1983).

[5] See *Haggins* v. *Warden*, 715 F.2d 1050 (6th Cir. 1983) (excited utterance); *United States* v. *Washington*, 688 F.2d 953, 959 (5th Cir. 1982) (business records); *Lenzar* v. *Wyrick*, 665 F.2d 804, 810-811 (8th Cir. 1981) (state-of-mind exception).

amining magistrates. Eighteenth century authorities perceived no contradiction between the recognized hearsay exceptions and the confrontation right.

In this country, the Confrontation Clause was inserted in the Bill of Rights with scarcely any discussion or debate. Had there been any thought that this provision departed from the settled understanding of the right of confrontation and affected the established exceptions to the hearsay rule, there would have surely been some explanation or controversy. This interpretation of the Confrontation Clause is strongly supported by early 19th century case law.

2. The present confusion regarding the meaning of the Confrontation Clause is traceable chiefly to a single hearsay exception, that for prior recorded testimony. This type of traditionally admissible hearsay may be aptly analogized to an affidavit or deposition, because like them it is generally nothing more than an inferior substitute for live testimony. Accordingly, this Court has tested former testimony against Confrontation Clause standards; and because former testimony is ordinarily only a next-best substitute for live testimony, former testimony has been held to be generally inadmissible unless live testimony cannot be obtained.

Unlike former testimony, evidence falling within other traditional hearsay exceptions, including the co-conspirator rule, has probative value very different from subsequent live testimony, and therefore under the law of hearsay the availability of the declarant to give live testimony has not been regarded as having any bearing on the admissibility of statements falling within most traditional exceptions. The court of appeals in this case and some other lower courts have in recent years lost sight of this critical distinction and have erred in mechanically subjecting the co-conspirator rule and other time-honored hearsay exceptions to additional obstacles to use derived from this Court's cases involving only the problems specifically associated with former testimony.

This Court's decisions do not support such an approach. On the contrary, this Court's Confrontation Clause cases involving the admission of hearsay appear to take a very different, three-part approach. First, in accordance with the historical origin of the Confrontation Clause, those forms of potentially admissible hearsay that resemble affidavits or depositions have been closely regulated—and it is in this specific context that availability has been considered important. Second, the Court has regarded other firmly rooted hearsay exceptions as presumptively constitutional. Third, the Court has held out the possibility that novel hearsay exceptions may be subjected to more exacting scrutiny.

3. Close reexamination of all of the traditional hearsay exceptions under the Confrontation Clause would be a burdensome and pointlessly duplicative process, especially since those exceptions have been forged with full consideration of the very same fundamental concern that underlies the Confrontation Clause: what kind of evidence is too likely to mislead the finder of fact to permit its use at trial. In the case of the co-conspirator rule, moreover, the Court would be reevaluating a doctrine that may aptly be characterized as the Court's own creation. Constitutionalizing the hearsay rules would also stunt beneficial evolution and experimentation.

4. The specific holding of the court of appeals in this case—that the prosecution may not introduce a co-conspirator statement unless the declarant is produced or the prosecution carries the burden of showing the declarant to be unavailable—would substantially impair the prosecution of crime without any appreciable benefits. Indeed, it does not seem an exaggeration to state that the Court has seldom had before it a proposed constitutional rule that would add more to the expense and complexity of criminal trials while contributing less to the reliability of their outcomes than the rule adopted by the court of appeals in this case.

The use of co-conspirator declarations as evidence at criminal trials is one of the great commonplaces of the American legal landscape, surely occurring tens of thou-

sands of times each year in state and federal courtrooms throughout the nation. Up until the last couple of years, the rules surrounding the admission or exclusion of such evidence never conditioned the admissibility of co-conspirator declarations on any showing respecting the availability or unavailability of the extra-judicial declarant. Under the court of appeals' rule, however, each extra-judicial declarant must now be produced in court (or his absence satisfactorily explained) as a condition to admission of his or her statement in furtherance of the conspiracy, whether or not any party actually wishes to call the declarant as a witness. Many of these individuals will not be locatable at the time of trial, in which case a hearing (potentially lengthy and complex) will have to be held into whether the prosecution made all reasonable efforts to locate the declarant or was somehow at fault in losing track of his or her whereabouts. Others may be serving prison sentences and will be producible only at considerable expense. Most of the declarants, if they are not already to be witnesses for one side or the other, will refuse to testify, and hearings will then be required to evaluate their claims of privilege and/or to determine whether they should be held in contempt before being found unavailable. And, of course, rulings of unavailability will provide fertile new ground for appellate review.

Moreover, all of this time, effort, and expense that will go into producing or litigating the unavailability of co-conspirator/declarants will have little effect on the actual course of the trial. It must be done even though the defendant has not independently elected to call the declarant as a witness and may have no interest whatever in having him actually testify, as likely was the case here (see J.A. 18), and even though the admissibility of statements made in furtherance of the conspiracy is the same whether the declarant in fact testifies or not.

II.

Finally, even if unavailability must be shown, the court of appeals should have remanded this case for a

hearing on the co-conspirator/declarant's availability rather than reflexively ordering a new trial. If the declarant was indeed unavailable at the time of trial, reversal was an inappropriate remedy, and a retrial would be pointless.

ARGUMENT

I. THE ADMISSION OF STATEMENTS IN CONFORMITY WITH THE TRADITIONAL CO-CONSPIRATOR RULE DOES NOT VIOLATE THE CONFRONTATION CLAUSE

A. The Confrontation Clause Was Intended To Prohibit Trial By Affidavit And Comparable Practices, Not To Proscribe Or Generally Regulate The Admission Of Hearsay

In recent years, there has been much confusion regarding the relationship between the right of confrontation protected by the Sixth Amendment and the rules regulating the admission or exclusion of hearsay. Historically, the right of confrontation and the hearsay rule were related but doctrinally discrete reforms of pre-18th century trial procedures. There was no mixing or confusion of these two doctrines in the minds of jurists, scholars, and statesmen at the time of the adoption of the Bill of Rights, and no intent to regulate hearsay generally by means of the Confrontation Clause.

1. The history of the hearsay rule has been recounted by legal scholars and need not be detailed here. See, *e.g.*, 5 *Wigmore on Evidence* § 1364 (Chadbourn rev. ed. 1974) [hereinafter cited as *Wigmore*]; 9 W. Holdsworth, *History of the English Law* 177-187, 214-219, 222-236 (1926); 1 J. Stephen, *A History of the Criminal Law of England* 216-233, 324-427 (1883); Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 Harv. L. Rev. 177, 179-183 (1948); Morgan, *The Hearsay Rule*, 12 Wash. L. Rev. 1 (1937). Before the 16th century, it was accepted practice for jurors to obtain information by consulting persons not called into court. 5 *Wigmore* § 1364, at 13-15. During the 1500s, evidence

obtained in this manner began to be overshadowed by evidence given by witnesses appearing in court (*id.* at 15), but hearsay statements were "constantly received" (*id.* at 17). Doubts about the value of such evidence arose during the 16th century and increased during the 17th, and by the 1680s there was "a fairly constant enforcement [of the hearsay rule] both in civil and criminal cases." *Id.* at 18. By the 18th century, the general rule was firmly established. *Id.* at 19.

This rule, however, was never devoid of exceptions. See 5 *Wigmore* § 1397, at 158; Morgan, 62 Harv. L. Rev. at 179. Scholars have found that the following exceptions had taken shape by the late 18th century: dying declarations,[6] regularly kept records,[7] declarations against interest,[8] past recollection recorded,[9] evidence of pedigree and family history,[10] and various types of reputation evidence.[11] In addition, as we will discuss (see pages 19-21, *infra*), the co-conspirator rule emerged during this same period.

2. The right of confrontation developed during the 17th century in response to the practice of convicting criminal defendants based upon affidavits. Towards the end of the 16th century, "[t]hough the crown was beginning to call witnesses, * * * the witnesses were not confronted with the prisoner." 9 W. Holdsworth, *supra*,

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[6] 5 *Wigmore* § 1430, at 275 ("This exception, as such, dates back as far as the first half of the 1700s."); *McCormick on Evidence* 680 (2d ed. 1972) [hereinafter cited as *McCormick*] ("as soon as we find a hearsay rule we also find a recognized exception for dying declarations").

[7] 5 *Wigmore* § 1518, at 426-428; *McCormick* 717-718; 3 W. Blackstone, *Commentaries on the Law of England* 368 (1768).

[8] 5 *Wigmore* § 1476, at 350.

[9] 3 *Wigmore* § 735, at 78-84; *McCormick*, 712.

[10] 5 *Wigmore* § 1480, at 363; *McCormick*, 745.

[11] 5 *Wigmore* § 1580, at 544; *McCormick* 748-759; 3 W. Blackstone, *supra*, at 368.

at 224; see also *Gannett Co.* v. *DePasquale*, 443 U.S. 368, 421 (1979) (Blackmun, J.).

Particularly relevant for present purposes was the function of the examining magistrate. Statutes enacted in 1554 and 1555 (1 & 2 Phil. & M. ch. 13; 2 & 3 Phil. & M. ch. 10) directed magistrates to interview and take the depositions of all witnesses to felonies;[12] this examination "was intended only for the information of the court. The prisoner had no right to be, and probably never was present. * * * [T]he depositions were to be returned to the court, but there is evidence to show that the prisoner was not allowed even to see them." 1 J. Stephen, *supra*, at 221.

These depositions were often the principal "evidence" at trial. As Stephen relates (*id.* at 325-326):

> The proof was usually given by reading depositions, confessions of accomplices, letters, and the like; and this occasioned frequent demands by the prisoner to have his "accusers," *i.e.*, the witnesses against him, brought before him face to face, though in many cases the prisoners appear to have been satisfied with the depositions.

The trial of Sir Walter Raleigh for treason in 1603 is illustrative of this procedure. A crucial element of the evidence against Raleigh consisted of the deposition of one Cobham and a letter that Cobham wrote thereafter, both of which indirectly implicated Raleigh in a plot to seize the throne. Raleigh had a written retraction from Cobham, and believed that Cobham would now testify in his favor. There was a lengthy dispute over Raleigh's right to have Cobham called as a witness, but the court refused the request, reasoning that "so many horse-stealers may escape, if they may not be condemned without witnesses,"[13] and Raleigh was convicted. 1 J.

[12] Misdemeanors were under the jurisdiction of the Star Chamber, which followed essentially similar procedures. 1 Stephen, *supra*, at 338.

[13] Quoted in Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. Pub. L. 381, 389 (1959).

Stephen, *supra*, at 333-336; 9 W. Holdsworth, *supra*, at 216-217, 226-228.

Another celebrated 17th century trial, that of the Quaker preacher John Lilburne, led to recognition of the right of confrontation. See Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. Pub. L. 381, 389-390 (1959). Charged in 1637 with illegally importing books attacking the Anglican bishops, Lilburne refused to answer the prosecution's questions, insisting that "my accusers ought to be brought face to face, to justify what they accuse me of."[14] Found in contempt by the Star Chamber, Lilburne was freed in 1640 by an act of Parliament condemning the action of the Star Chamber.[15] "Thereafter," according to a commentator, "there was no dispute in England about the right to confrontation." Pollitt, *supra*, 8 J. Pub. L. at 390.

3. The 18th century understanding of the relation between the right of confrontation and the hearsay rule is illustrated by the writings of Hale and Blackstone. Two points of importance for the present case are highlighted by their analyses: first, these two doctrines were not tied together but were viewed as distinct; second, no contradiction was perceived between the right of confrontation and the existence of exceptions to the hearsay rule.

Discussing trial by jury, Hale made express reference to the hearsay exceptions for regularly kept records and ancient deeds. He stated that evidence in jury trials was given "upon the OATH of witnesses, or other evidence by law allowed;—as Records and Ancients Deeds." M. Hale, *The History of the Common Law of England* 342 (6th ed. 1820). Several pages later, without any hint of contradiction, he wrote that "by [the] personal appearance

[14] Stephen, *Criminal Procedure From the Thirteenth to the Eighteenth Century*, in 2 *Select Essays in Anglo-American Legal History* 443, 506 (1908).

[15] Stephen, *Criminal Procedure From the Thirteenth to the Eighteenth Century* in 2 *Select Essays in Anglo-American Legal History*, *supra*, at 507. See generally, Wolfram, *John Lilburne: Democracy's Pillar of Fire*, 3 Syracuse L. Rev. 213 (1952).

and testimony of witnesses, there is opportunity of confronting the adverse witnesses; * * * and by this means great opportunities are gained, for the true and clear discovery of the truth." *Id.* at 345-346.[16]

Blackstone's discussion is similar but more detailed. After disclaming any intent "to enter into the numberless niceties and distinctions of what is, or is not, legal *evidence* to a jury" (3 W. Blackstone, *Commentaries on the Law of England* 367 (1768) (emphasis in original)), he referred to the hearsay rule and the fact that it has exceptions (*id.* at 368):

> [N]o evidence of a discourse with another will be admitted, but the man himself must be produced; yet in some cases (as in proof of any general customs, or matters of common tradition or repute) the courts admit of hearsay evidence * * *.

Five pages later, Blackstone provided a classic statement of the right of confrontation, explaining both its meaning and purpose (*id.* at 373-374) (footnotes omitted; emphasis added):

> This open examination of witnesses *viva voce*, in the presence of all mankind, is much more conducive to the clearing up of truth, than the private and secret examination taken down in writing before an officer, or his clerk in the ecclesiastical courts and all others that have borrowed their practice from civil law: where a witness may frequently depose that in private, which he will be ashamed to testify in a public and solemn tribunal. There an artful or careless scribe may make a witness speak what he never meant, by dressing up his depositions in his own forms and language; but he is here at liberty to correct and explain his meaning, if misunderstood, which he can never do after a written deposition is once taken. Besides the occasional questions of the judge, the jury, and the counsel, propounded to the

[16] See also 2 W. Hawkins, *A Treatise of the Pleas of the Crown* 429-431 (1721) (treating the admission of depositions taken pursuant to the above-noted statutes and the admission of hearsay as two separate questions).

> witnesses on a sudden, will sift out the truth much better than a formal set of interrogatories previously penned and settled: and *the confronting of adverse witnesses* is also another opportunity of obtaining a clear discovery, which can never be had upon any other method of trial. * * * In short by this method of examination, and this only, the persons who are to decide upon the evidence have an opportunity of observing the quality, age, education, understanding, behavior, and inclinations of the witness; in which points all persons must appear alike, when their depositions are reduced to writing, and read to the judge, in the absence of those who made them: and yet as much may be frequently collected from the manner in which the evidence is delivered, as from the matter of it. These are a few of the advantages attending this, the English way of giving testimony, *ore tenus.*

In short, Blackstone explained that the right to confrontation was nothing more than the right to a trial in which the prosecution's case was established by live witnesses rather than by depositions or written interrogatories.

4. In view of this understanding of the nature and extent of the right of confrontation, the events surrounding the adoption of the Sixth Amendment take on an unmistakable meaning.

Most of the state constitutions in effect at the time of federal constitutional convention of 1787 guaranteed the right to confrontation.[17] When the Constitution was considered by the state ratifying conventions and a consensus emerged that a Bill of Rights should be added, amendments proposed in several of the state conventions contained provisions guaranteeing this right.[18] Inclusion of the confrontation right in these proposals occasioned

[17] See 1 B. Schwartz, *The Bill of Rights: A Documentary History* 235 (1971) (Va.); *id.* at 265 (Pa.); *id.* at 277 (Del.); *id.* at 282 (Md.); *id.* at 287 (N.C.); *id.* at 323 (Vt.); *id.* at 341, 371 (Mass.); *id.* at 377 (N.H.).

[18] 2 B. Schwartz, *supra*, at 665 (Pa.) (unsuccessful proposal); *id.* at 841 (Va.); *id.* at 913 (N.Y.).

little discussion and no controversy, but the few remarks made about this right fully support the view that there was no intention to alter or expand the common law doctrine.

In Pennsylvania, where the first convention was held, amendments unsuccessfully proposed by Antifederalists would have guaranteed "[t]hat in all capital and criminal prosecutions, a man has a right * * * to be confronted with the accusers and witnesses." [19] The proponents explained that their aim was to preserve "the common law proceedings for the safety of the accused in criminal prosecutions." [20] Although rejected in Pennsylvania, the Antifederalist proposal became the model for states "which desired to ratify the Constitution and, at the same time, wanted a Bill of Rights." [21]

In Virginia, Patrick Henry criticized the Constitution because it failed to protect individual rights guaranteed at common law and by the Virginia Declaration of Rights of 1776 [22] (which protected the right of confrontation).[23] The Virginia Convention appointed a committee, including Henry and James Madison, to draft proposed amendments.[24] The committee's proposal, which contained a confrontation provision identical to that in the Virginia Declaration, was adopted by the Convention.[25]

After ratification of the Constitution, James Madison proposed adoption by the First Congress of 12 constitutional amendments, one of which protected the confrontation right.[26] This right was included in the Sixth Amendment and adopted without discussion.[27]

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[19] 2 B. Schwartz, *supra*, at 665.

[20] 2 B. Schwartz, *supra*, at 668.

[21] 2 B. Schwartz, *supra*, at 628.

[22] 2 B. Schwartz, *supra*, at 798-799.

[23] 1 B. Schwartz, *supra*, at 235.

[24] 2 B. Schwartz, *supra*, at 839.

[25] 2 B. Schwartz, *supra*, at 841.

[26] 1 Annals of Cong. 1785-1790 (1789).

[27] *Ibid.* See E. Dumbauld, *The Bill of Rights* 33-49, 53-54 (1957).

From this history and the 18th century understanding of the right of confrontation, three points of importance for present purposes emerge. First, the paucity of explanation or discussion about the meaning of the right to confrontation can signify only that the meaning of that right was commonly understood and that there was no thought that the Sixth Amendment departed from this settled meaning. This is reinforced by the absence of any controversy regarding the inclusion of the Confrontation Clause in the Bill of Rights. Second, as best we can determine, not a word was spoken or written—by those who sought the adoption of a bill of rights, by the First Congress, or by the state legislatures that ratified the Bill of Rights—to suggest that the confrontation right had anything to do with the general regulation of hearsay or the details of the law of evidence.

It is also telling for present purposes that the rule allowing admission of co-conspirator declarations had already emerged in England at the time of the adoption of the Sixth Amendment. In a famous trial in 1710, Daniel Dammaree and others were convicted of treason for leading a mob that pulled down four dissenting meeting houses. *Trial of Daniel Dammaree*, 15 State Tr. 522 (1710); see 1 J. Stephen, *supra*, at 270-271. The Lord Chief Justice instructed the jury that in order to convict Dammaree of treason it was necessary to show that it was his intention not simply to destroy a single meeting house, "but to pull them down all" (15 State Tr. at 607), and in this connection the prosecution's witnesses permissibly related numerous statements made by members of the mob that bore upon their intentions (*id.* at 552-562, 595-599).

In an equally well known case, Lord George Gordon was tried for treason in 1781 for leading a mob that attempted by force to procure the repeal of a law mitigating the penalties imposed on Roman Catholics. The mob broke open jails, assaulted the Bank of England, and "tried to burn down London." 2 J. Stephen, *A History of the Criminal Law of England* 273 (1883). Lord

Gordon's defense was that he did not intend to encourage these extreme acts but merely to engage in petitioning. *Trial of Lord George Gordon*, 21 State Tr. 522, 591-592 (1781). Again, as in the *Dammaree* case, numerous statements made by members of the mob were admitted (see 21 State Tr. at 514-515, 526-527, 529-540).

The contemporary understanding of these precedents was shown in a string of treason trials in which the defendants were charged with trying to bring the French Revolution to England. For example, in the *Trial of Thomas Hardy*, 24 State Tr. 200, 453 (1794), Lord Chief Justice Eyre relied on *Dammaree* and *Gordon* for the proposition that "the correspondence of one man who is a party in a conspiracy, would undoubtedly be evidence, correspondence in furtherance of the plot." Justice Buller observed (24 State Tr. at 452) (footnotes omitted):

> In Dammaree and Purchase's cases evidence was received of what some of the parties had done when the prisoner was not there. The attorney general says, I call this witness, not to speak in particular to the prisoner, but to shew the intention of the mob. * * * In the cases that have happened in our own time, in Lord George Gordon's case, evidence of what different persons of the mob had said, though he was not there, was admitted.

See also *Trial of John Horne Tooke*, 25 State Tr. 1 (1794); *Trial of William Stone*, 25 State Tr. 1155, 1277-1278 (1794). In sum, at the time of the adoption of the Bill of Rights, the co-conspirator rule was, if not firmly established, at least very clearly foreshadowed in English law.

In this country, the co-conspirator rule was adopted by the Supreme Court of New Jersey in 1791, the very year in which the Bill of Rights was ratified. *Patton* v. *Freeman*, 1 N.J.L. 113, 115 (1791). Similar decisions were soon handed down by the highest courts of Vermont, Virginia, and Pennsylvania. *Broughton* v. *Ward*, 1 Tyl. 137, 139 (Vt. 1801); *Claytor* v. *Anthony*, 27 Va. (6

Rand.) 285, 300-301 (1828); *Reitenbach* v. *Reitenbach*, 1 Rawle 362, 365 (Pa. 1829). This Court first recognized the co-conspirator rule in *United States* v. *Gooding*, 25 U.S. (12 Wheat.) 459 (1827). Justice Story, the author of that opinion, made clear in his constitutional treatise that he did not perceive any inconsistency between the Confrontation Clause and traditional hearsay exceptions. The Confrontation Clause, he wrote, "does but follow out the established course of the common law in all trials for crimes. The trial is always public; the witnesses are sworn, and give their testimony (at least in capital cases) in the presence of the accused." 3 J. Story, *Commentaries on the Constitution* 662 (2d ed. 1833).

In our view, this history weighs very heavily against the view that the traditional co-conspirator rule—with criteria for admissibility that include no requirement of a showing of unavailability or of an individualized determination of reliability of particular statements otherwise satisfying the rule—is inconsistent with the Confrontation Clause.

5. The meaning of the Confrontation Clause is also illuminated by the views of judges of the early and mid-19th century, who evinced no doubt about the origin and scope of the right to confrontation and were firmly of the view that this right did not call into question the validity of traditional hearsay exceptions.

In *Woodsides* v. *State*, 3 Miss. (2 Howard) 655 (1837), the Mississippi High Court of Errors and Appeals held that the confrontation clause in the state constitution did not preclude the admission of a dying declaration. The court stated (*id.* at 665) that the confrontation requirement "was but an affirmation of a long cherished principle of the common law," *i.e.*, that "the accused is secured in the right of an oral examination of the opposing witnesses, and of the advantages of a cross-examination."

Admission of a dying declaration did not abridge the defendant's right "to be confronted with the witness against him," the court explained (*ibid.*), because "the murdered individual is not a witness." "It is the individual who swears to the statements of the deceased that is the witness" (*ibid.*).

During this period, several other state courts heard similar objections to the admission of dying declarations, to which they invariably gave the same answer. The Supreme Court of Tennessee wrote (*Anthony* v. *State*, 19 Tenn. (Meigs) 265, 277-278 (1838)), that the purpose of the state confrontation clause "was not to introduce a new principle" but to perpetuate a right won in England "after a long contest" with the crown. The Supreme Court of Georgia wrote (*Campbell* v. *State*, 11 Ga. 353, 374 (1852)):

> The right of a party accused of a crime, to meet the witnesses against him, face to face, is no new principle. It is coeval with the Common Law. * * * The argument for the exclusion of the testimony [respecting the dying declaration], proceeds upon the idea that the deceased is the witness, when in fact it is the individual who swears to the statements of the deceased, who is the witness. * * *
>
> The admission of dying declarations in evidence, was never supposed, in England, to violate the well-established principles of the Common Law, that the witnesses against the accused should be examined in his presence.

See also, *e.g.*, *State* v. *Tilghman*, 33 N.C. (11 Ired.) 513, 554 (1850); *Commonwealth* v. *Carey*, 16 Mass. (12 Cush.) 246 (1851); *Lambeth* v. *State*, 23 Miss. 322, 357 (1852); *Walston* v. *Commonwealth*, 55 Ky. (16 B. Mon.) 15, 25 (1855); *State* v. *Waldron*, 16 R.I. 191, 193-195 (1888).

6. As we have seen, the jurists and scholars of the 18th and early 19th centuries saw no contradiction between the right to confrontation and the admission of out-of-court statements falling within exceptions to the

hearsay rule. For them, the difference between trial by affidavit and the recognition of hearsay exceptions was so obvious that they apparently saw no need to articulate the reasons for prohibiting the former while allowing the latter. But the reasons can easily be explained.

An affidavit or deposition, particularly if created ex parte, is ordinarily nothing but a less desirable substitute for live testimony. It can be as detailed and comprehensive as the direct examination of a live witness. It can be crafted to make out all of the elements of a criminal charge. It is usually created with litigation in mind and thus is subject to all of the slanting and distortion that the pressures of litigation may produce. It is also usually created in the presence or with the cooperation (and thus under the potential influence) of one of the parties.

Most admissible hearsay shares none of these characteristics. It often consists of a few utterances (see, *e.g.*, Fed. R. Evid. 803(1) (present sense impressions), 803(2) (excited utterances)). It is rarely made during or even in contemplation of litigation (see, *e.g.*, Fed. R. Evid. 803(5) (past recollection recorded), 803(6) (business records)). And most admissible hearsay is widely thought to have probative value independent of whatever testimony the declarant might later give at trial. To take just one of many possible examples, a statement made for purposes of medical diagnosis or treatment (see Fed. R. Evid. 803(4)), when the declarant's health may lie in the balance, is thought to have a probative significance quite independent of and possibly greater than testimony that the declarant might later give in court. It is for this reason that the common law did not condition use of most hearsay exceptions upon a showing of unavailability by the proponent of the evidence and that 23 of 27 specific hearsay exceptions in the Federal Rules of Evidence apply irrespective of the declarant's availability. Compare Fed. R. Evid. 803(1)-(23) with Fed. R. Evid. 804(b)(1)-(4).

There are, however, a few types of potentially admissible hearsay that can aptly be compared to an affidavit or deposition, and it is there that the requirements of the Confrontation Clause and the hearsay rules overlap. Former testimony (see Fed. R. Evid. 804(b)(1)) is the most striking example. Absent special circumstances, former testimony is simply a next-best substitute for live testimony and therefore is admissible as substantive evidence under the Federal Rules only if the declarant is unavailable. Former testimony may be similar in breadth and detail to live testimony. It occurs in a court proceeding—often a proceeding related to that in which it is later sought to be introduced. And even when accompanied by cross-examination, former testimony is thought to be generally less reliable than live testimony because the trier of fact cannot observe the witness's demeanor. Fed. R. Evid. 804(b)(1) advisory committee note.

A third party's confession, which may fall within the modern exception for declarations against penal interest (Fed. R. Evid. 804(b)(3)), is another example of hearsay that may properly be subject to close regulation under the Confrontation Clause. Confessions may have all the breadth and detail of an affidavit or deposition. And like the affidavits and depositions obtained by examining magistrates in the 17th century, confessions are generally obtained ex parte, in contemplation of litigation, and with the participation of prosecutorial authorities.

The court of appeals' erroneous decision in the present case resulted from a failure to appreciate the difference between those types of potentially admissible hearsay that are analogous to ex parte affidavits and depositions and are thus properly subject to close Confrontation Clause scrutiny and the remaining traditional hearsay exceptions, which should be regarded as presumptively valid.

B. This Court's Confrontation Clause Decisions Have Closely Regulated The Admission Of Former Testimony But Have Treated Most Other Traditional Hearsay Exceptions As Presumptively Valid

This Court's Confrontation Clause cases disclose a three-part approach to the admission of hearsay. First, this Court has closely regulated the admission of hearsay, such as former testimony, that is broadly analogous to an affidavit or deposition. The vast bulk of this Court's Confrontation Clause cases have dealt with former testimony and thus fall into this category. Second, the Court has not subjected other traditional hearsay exceptions to the same close regulation. Recognizing that the Confrontation Clause and the hearsay rule both embody the view that live testimony, with an opportunity for cross-examination, is generally the most reliable form of evidence, the Court has regarded time-tested hearsay exceptions as presumptively consonant with the Constitution. Third, the Court has held out the possibility of closer examination of any new and radical departures from traditional hearsay rules.

1. Most of this Court's Confrontation Clauses cases dealing with hearsay have concerned the propriety of admitting former testimony. As previously noted, former testimony is comparable in several critical respects to an affidavit or deposition, and thus close regulation of this type of hearsay is consistent with the historical roots of the confrontation right.

This close examination has focused first upon the availability of the declarant to give live testimony. As earlier discussed, former testimony usually is simply an inferior substitute for live testimony, and accordingly there is generally no reason to admit former testimony if live testimony can reasonably be obtained. Thus, from the Court's first Confrontation Clause case, *Reynolds* v. *United States*, 98 U.S. 145 (1879), to *Ohio* v. *Roberts*, 448 U.S. 56 (1980), the Court has explored the circumstances in which there is sufficient reason to permit the

prosecution to use a substitute for live testimony. The Court has found adequate cause for admitting former testimony where the absence of the declarant was procured by the defendant (*Reynolds*, 98 U.S. at 158-161), where the declarant had died (*Mattox* v. *United States*, 156 U.S. 237 (1895)), where the declarant had left the country and was beyond the reach of the court's process (*Mancusi* v. *Stubbs*, 408 U.S. 204 (1972)), and where the declarant was a young person who had left home, was "traveling," and could not be located by her parents or by the authorities (*Ohio* v. *Roberts*, *supra*). By contrast, the Court has held that resort to former testimony was not justified where the government negligently allowed the declarant to slip out of the courthouse before testifying (*Motes* v. *United States*, 178 U.S. 458 (1900)), and where the state did not pursue available procedures for obtaining the presence in court of a declarant incarcerated in a federal prison in another state (*Barber* v. *Page*, 390 U.S. 719 (1968)).

Roberts summarized this case law as follows (448 U.S. at 65):

> In the usual case (including cases where prior cross-examination has occurred), the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant. See *Mancusi* v. *Stubbs*, 408 U.S. 204 (1972); *Barber* v. *Page*, 390 U.S. 719 (1968). See also *Motes* v. *United States*, 178 U.S. 458 (1900); *California* v. *Green*, 399 U.S. at 161-162, 167 n.16.[7]

[7] A demonstration of unavailability, however, is not always required * * *.

The court of appeals in this case (Pet. App. 12a) interpreted this passage to mean that a demonstration of unavailability is generally required before *any* hearsay can be admitted, but in our view this statement must have been intended to describe only the exception for former testimony. The four cases cited by the Court all

involved former testimony. The Court's suggestion that "the usual case" may feature "prior cross-examination" also indicates that the Court had former testimony in mind, since no other type of hearsay statement is likely to have been subjected to prior cross-examination. Moreover, since most traditionally admissible hearsay has a probative value independent of any testimony that the declarant might later give, it would be strange to bar the admission of such hearsay on the ground that the declarant was available to testify. Twenty-three of the 27 specific hearsay exceptions recognized in the Federal Rules of Evidence do not require the unavailability of the declarant. Fed. R. Evid. 803, 804. If the court of appeals' reading of *Roberts* were correct, all of these exceptions (and thus a substantial portion of the federal hearsay rule) would contravene the Confrontation Clause. We do not believe that the *Roberts* Court intended to embrace such a revolutionary proposition in such an offhand manner.

In addition to unavailability, the second question in this Court's former testimony cases has been whether the former testimony was given under circumstances providing sufficient guarantees of trustworthiness. All hearsay exceptions identify circumstances thought to provide sufficient assurance of reliability that it is deemed better to let the fact-finder hear and weigh the evidence than to exclude it entirely. For example, some types of hearsay are thought to possess qualities of reliability because uttered in circumstances that preclude reflection or conscious fabrication[28] or in circumstances in which the declarant has a strong self-interest in making a truthful statement.[29] With respect to former testimony, which

[28] See, *e.g.*, Fed. R. Evid. 803(1) (present sense impression), 803(2) (excited utterance), 803(3) (then existing mental, emotional, or physical condition).

[29] See, *e.g.*, Fed. R. Evid. 803(4) (statements for purposes of medical diagnosis or treatment), 803(6) (records of regularly conducted activity).

lacks these reassuring characteristics, trustworthiness is instead advanced by legal procedures at the proceeding in which the former testimony is given. In its former testimony cases, this Court has considered the adequacy of these safeguards and has found them satisfactory where the former testimony was given under oath and was cross-examined, or where there was at least opportunity and similar motive for cross-examination or its equivalent. See *Reynolds*, 98 U.S. at 161; *Mattox*, 156 U.S. at 249; *California* v. *Green*, 399 U.S. 149, 165-168 (1970); *Ohio* v. *Roberts*, 448 U.S. at 67-73. Not only is this close examination of the trustworthiness of former testimony consistent with the historical purpose of the Confrontation Clause, but it is singularly appropriate in this context because it entails an evaluation of court procedures rather than the psychological judgments about human behavior outside the courtroom that underlie most of the other traditional hearsay exceptions.

Besides these former testimony cases, the Court has also decided several Confrontation Clause cases involving the use of third-party confessions. As previously noted, such confessions, like former testimony, bear sufficient resemblance to ex parte affidavits or depositions to call for close examination under the Confrontation Clause. Accordingly, in *Douglas* v. *Alabama*, 380 U.S. 415 (1965), the Court found a Confrontation Clause violation where the prosecuting attorney, in the guise of refreshing the recollection of an accomplice who refused to testify on the ground of self-incrimination, read the accomplice's confession to the jury. And in *Bruton* v. *United States*, 391 U.S. 123 (1968), the Court held that the Confrontation Clause was violated by the admission at a joint trial of a confession made by a non-testifying defendant and implicating his co-defendant.[30]

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[30] See also *Tennessee* v. *Street*, No. 83-2143 (May 13, 1985) (no *Bruton* violation where confession introduced for non-hearsay purposes); *Parker* v. *Randolph*, 442 U.S. 62 (1979) (application of *Bruton* to interlocking confessions); *Brown* v. *United States*, 411 U.S. 223, 230-232 (1973) (*Bruton* error harmless); *Schneble* v. *Florida*, 405 U.S. 427 (1972) (*Bruton* error harmless); *Nelson* v. *O'Neill*, 402 U.S. 622 (1971) (*Bruton* does not apply where co-defendant testifies in defendant's favor and denies incriminating statement); *Harrington* v. *California*, 395 U.S. 250 (1969) (*Bruton* error harmless); *Roberts* v. *Russell*, 392 U.S. 293 (1968) (*Bruton* retroactive and applies to the states).

2. The Court has taken a very different approach to other traditional hearsay exceptions. On the few occasions when such exceptions have been challenged under the Confrontation Clause, the challenges were firmly rebuffed. In *Delaney* v. *United States*, 263 U.S. 586, 590 (1924), the Court rejected a Confrontation Clause objection to the admission of co-conspirator statements, tersely observing that the statements were "within the ruling of the cases" of this Court recognizing the co-conspirator rule. Two years later, in *Salinger* v. *United States*, 272 U.S. 542, 547-548 (1926), the Court considered a Confrontation Clause challenge to documentary evidence admitted as res gestae. Noting that the evidence had hearsay and non-hearsay components (272 U.S. at 547-548), the Court rejected the Confrontation Clause argument, stating (*id.* at 548):

> The right of confrontation did not originate with the provision in the Sixth Amendment, but was a common-law right having recognized exceptions. The purpose of that provision, this Court often has said, it to continue and preserve that right, and not to broaden it or disturb the exceptions. * * * * The present contention attributes to the right a much broader scope than it had at common law * * *.

The Court has also repeatedly commented on the presumptive constitutionality of statements falling within traditional hearsay exceptions. In *Mattox*, 156 U.S. at 237, the Court stated that the Clause must be interpreted "in the light of the law as it existed at the time it was adopted," including "exceptions [that were] recognzed long before the adoption of the Constitution * * * [and that] were obviously intended to be respected" (*id.* at 243). Noting the settled hearsay exception for dying declarations, the Court stated (*id.* at 243-244) that "no

one would have the hardihood at this day to question their admissibility." See also *Pointer* v. *Texas*, 380 U.S. at 407.

In *Dutton* v. *Evans*, 400 U.S. 74 (1970), which involved a state provision expanding the traditional co-conspirator rule, the plurality noted and appeared to disapprove (*id.* at 80) the lower court's interpretation of the Confrontation Clause, because it would "require[] a reappraisal of every exception to the hearsay rule, no matter how long established, in order to determine whether * * * it is supported by 'salient and cogent reasons.'" The plurality continued (400 U.S. at 80) that it did "question the validity of the co-conspirator exception applied in the federal courts."

Ohio v. *Roberts*, *supra*, capsulized this approach by stating that "certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the 'substance of the constitutional protection'" (448 U.S. at 66, quoting *Mattox*, 156 U.S. at 244).

The reasons for this approach are apparent. Although doctrinally discrete, the Confrontation Clause and the hearsay rule are both based upon the view that live testimony with the opportunity for cross-examination is generally the best procedure for discovering the truth. But more than 400 years of experience have given rise to many refinements of the general prohibition against hearsay, and a consensus has been reached, both here and throughout the common-law world, that certain types of hearsay statements are sufficiently trustworthy to permit their admission and evaluation by the trier of fact. This Court has declined to overrule the collective judgment of the countless common law judges, scholars, and legislators whose experiences and thinking are embodied in the traditional hearsay exceptions. As the Court succinctly put it in *Roberts* (448 U.S. at 66): "Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception."

The concept of "reliability" in hearsay and Confrontation Clause analysis is both narrower and broader than

one might generally suppose. It is narrower, in part, because the question raised by an objection to hearsay on the ground of reliability is not whether the particular evidence is true or believable (much live testimony, after all, is neither) but whether the evidence is by its nature so misleading that the trier of fact should not even be allowed to hear it. Moreover, when this Court is called upon to propound a standard of constitutionally required reliability, the Court's task is not to evaluate which of many possible rules of admission or exclusion is the soundest "purely as a matter of the law of evidence" (*California* v. *Green*, 399 U.S. at 155). Rather, the Court must articulate durable, national standards that will assure minimum levels of trial fairness without unduly restricting federal and state evidence law either now or for the future.

The concept of "reliability" in the present context is broader than might otherwise be assumed because the judgment underlying most of the traditional hearsay exceptions is that statements falling within those categories "possess circumstantial guarantees of *trustworthiness sufficient to justify nonproduction of the declarant in person at trial even though he may be available.*" Fed. R. Evid. 803 advisory committee note (proposed rules) (emphasis added). Thus, respect for the process of incremental legal development that has refined the traditional hearsay rules leads to the conclusion that evidence falling within most of the traditional hearsay exceptions is trustworthy enough for admission whether or not the declarant is available. It would be strange to defer to only one-half of this unitary evolutionary judgment.

3. While this Court has not questioned the constitutionality of most traditional hearsay exceptions, it has left open the possibility that novel exceptions or radical departures may be tested against stricter standards. In *Dutton* v. *Evans*, *supra*, as previously noted, the Court considered the constitutionality of admitting evidence under just such an exception—a Georgia variation of the traditional co-conspirator rule that permitted the admission of statements made during the concealment phase of

the conspiracy. Without intimating that it would be appropriate "to require a constitutional reassessment of every established hearsay exception" (400 U.S. at 80), the *Dutton* plurality weighed the constitutionality of admitting the co-conspirator statement in that case and found no Confrontation Clause violation. In support of this conclusion, the plurality noted that the challenged statement was "of peripheral significance" (400 U.S. at 87), that the co-conspirator's statement bore "indicia of reliability" (*id.* at 89), and that the value of cross-examining the co-conspirator declarant was "wholly unreal" (*ibid.*).

At most, the *Dutton* plurality opinion suggests that novel hearsay exceptions may be subject to closer analysis than those that have become established through the common law process. We see little justification for the drastic view of those courts, including the Third Circuit, that have read *Dutton* to restructure the law of evidence by introducing a general requirement that each piece of hearsay evidence be separately assessed for reliability even if it falls within a general class recognized under the law of evidence as admissible despite its hearsay character.[31] Instead, the *Dutton* plurality should be taken at its word, *i.e.*, that it was merely "deciding the case before [it]" (400 U.S. at 86). Moreover, two of the four members of the plurality, Justice Blackmun and the Chief Justice, thought that the case could have been decided on the basis of harmless error (*id.* at 90-93), and the fifth member of the majority, Justice Harlan, would have adopted Wigmore's view that the Confrontation Clause does not " 'prescribe what kinds of testimonial statements * * *

[31] See, *e.g.*, *United States* v. *Ordonez*, 737 F.2d 793, 802-804 (9th Cir. 1983); *United States* v. *Ammar*, 714 F.2d 238, 254-257 (3d Cir. 1983), cert. denied, 464 U.S. 936 (1983); *United States* v. *Wright*, 588 F.2d 31, 37-38 (2d Cir. 1978), cert. denied, 440 U.S. 917 (1979); *United States* v. *Kelley*, 526 F.2d 615, 620-621 (8th Cir. 1975), cert. denied, 424 U.S. 971 (1976); *United States* v. *Snow*, 521 F.2d 730, 734-735 (9th Cir. 1975), cert. denied, 423 U.S. 1090 (1976).

shall be given infra-judicially' " (400 U.S. at 94, quoting 5 *Wigmore on Evidence* § 1397, at 131 (3d ed. 1940)).[32]

C. Reevaluating The Co-Conspirator Rule And Other Traditional Hearsay Exceptions Under The Confrontation Clause Would Be Pointlessly Duplicative And Disruptive And Would Stultify The Evolution Of Federal And State Rules Of Evidence

1. If most traditional hearsay exceptions are not presumptively constitutional, the Court will be compelled to

[32] In addition to the cases surveyed in the text, the Court has decided Confrontation Clause cases that did not concern the admission of evidence and are thus not relevant for present purposes. Some of these cases involved restrictions on cross-examination. *E.g.*, *Davis* v. *Alaska*, 415 U.S. 308 (1974); *Chambers* v. *Mississippi*, 410 U.S. 284 (1973); *Smith* v. *Illinois*, 390 U.S. 129 (1968); *Brookhart* v. *Janis*, 384 U.S. 1 (1966). Others, like *Illinois* v. *Allen*, 397 U.S. 337 (1970), concerned the defendant's right to be present at trial. See also *Snyder* v. *Massachusetts*, 291 U.S. 97 (1934) (due process not violated by pretrial view of murder scene by jury without defendants' presence).

The unusual cases of *Kirby* v. *United States*, 174 U.S. 4 (1899), and *Dowdell* v. *United States*, 221 U.S. 325 (1911), also did not concern the admission of evidence. In *Kirby*, the Court struck down a statute providing that in a prosecution for receipt and possession of stolen stamps the thieves' judgment of conviction was conclusive proof that the stamps were stolen. Invoking the Confrontation Clause, the first Justice Harlan noted (174 U.S. at 54) that the defendant against whom the judgments were admitted had not been present at the thieves' trial and that, as a non-party, he could not have cross-examined them even if he had been there. But as the second Justice Harlan suggested (*Dutton* v. *Evans*, 400 U.S. at 98-99), the more fundamental error was a misapplication of principles of res judicata that amounted to a denial of due process. See *Sandstrom* v. *Montana*, 442 U.S. 510 (1979); cf. Fed. R. Evid. 803(22).

Dowdell likewise did not involve the admission of hearsay but what is perhaps best viewed as judicial notice of court records relating to a claim of procedural error. The Supreme Court of the Philippine Islands had directed the trial judge, court reporter, and court clerk to forward certificates relating whether the defendants had been arraigned, whether they had entered a plea, and whether they had been present at their trials (221 U.S. at 327-328). This Court held that the right to confrontation allowed this procedure because the trial judge, reporter, and clerk did not "testify to facts concerning * * * guilt" (*id.* at 330-331).

reevaluate all of these exceptions and the numerous variations that have grown up in federal and state evidence law. This would be, in our view, a pointlessly duplicative process. As we have observed, the traditional exceptions to the hearsay rule embody the thinking and experience of generations of judges, legislators, scholars, and practitioners about the kinds of evidence that fact-finders may safely be permitted to consider. Moreover, these exceptions have been forged with full consideration of the very concepts—reliability and availability of the declarant—that this Court identified in *Ohio* v. *Roberts*, 448 U.S. at 65-66, as material under the Confrontation Clause. In developing the proposed Federal Rules of Evidence, for example, the advisory committee carefully considered whether each of the hearsay exceptions possessed sufficient "guarantees of trustworthiness." Fed. R. Evid. art. VIII advisory committee note. The advisors likewise considered whether each exception should contain a requirement of unavailability. See Fed. R. Evid. 803, 804 & advisory committee notes. This scheme was reviewed, revised, and adopted by this Court. 56 F.R.D. 183 (1972). It was again reviewed, revised, and adopted by Congress. Pub. L. No. 93-595, § 1, 88 Stat. 1926. It is puzzling, therefore, what it is thought would be gained by repeating this process under the aegis of the Confrontation Clause.

The argument that this Court should reexamine the federal co-conspirator rule under the light of the Confrontation Clause seems particularly pointless, for that rule in its modern form is in every sense the creation of this very Court. This Court adopted the rule more than a century and a half ago in *United States* v. *Gooding*, 25 U.S. (12 Wheat.) 460, 469-470 (1827), and since then has frequently reaffirmed, applied, and refined it. See, *e.g.*, *United States* v. *Nixon*, 418 U.S. 683, 701 (1974); *Anderson* v. *United States*, 417 U.S. 211, 218 (1974); *Dutton* v. *Evans*, 400 U.S. 74, 81 (1970); *Wong Sun* v. *United States*, 371 U.S. 471, 490 (1963); *Lutwak* v. *United States*, 344 U.S. 604, 617-618 (1953); *Krulewitch* v. *United States*, 336 U.S. 440, 442-443 (1949); *Glasser* v. *United States*, 315 U.S. 60, 74-75 (1942); *Wiborg* v. *United States*, 163 U.S. 632, 657-658 (1896); *Clune* v. *United States*, 159 U.S. 590, 593 (1895); *St. Clair* v. *United States*, 154 U.S. 134, 149-150 (1894); *Brown* v. *United States*, 150 U.S. 93, 97-98 (1893); *Logan* v. *United States*, 144 U.S. 263, 308-309 (1892); *Nudd* v. *Burrows*, 91 U.S. 426, 438 (1875); *Lincoln* v. *Claflin*, 74 U.S. (7 Wall.) 132, 138-139 (1868); *American Fur Co.* v. *United States*, 27 U.S. (2 Pet.) 358, 364 (1829).[33] It seems to us virtually inconceivable that the Third Circuit and like-minded courts could be correct in their recent and astonishing discovery that this firmly anchored and carefully evolved body of doctrine articulated by this Court over the past 150 years fails to meet basic constitutional minima established in the Bill of Rights.

2. Our point is not that the traditional hearsay rules or the federal or state variations are perfect and should never be reexamined. On the contrary, periodic reexamination and refinement are essential. But this task should not be performed by this Court under the authority of the Confrontation Clause. Constitutionalizing the hearsay rules would stunt their development and preclude beneficial experimentation both at the federal and state levels. Both the Court and individual Justices have frequently observed that the Confrontation Clause should

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[33] Moreover, Fed. R. Evid. 801(d)(2)(E) was promulgated by this Court in precisely its present form. 56 F.R.D. at 293. From the Preliminary Draft of The Proposed Rules of Evidence submitted by the Advisory Committee of the Judicial Conference in March 1969 (see 46 F.R.D. 161, 331 (1969); Rule 8-01(c)(3)(v)), through the final version of the Rules submitted by this Court to Congress and passed by Congress in 1975, Pub. L. No. 93-595, art. VIII, 88 Stat. 1938, the co-conspirator exception remained unchanged and engendered no controversy. Both the Advisory Committee (see Fed. R. Evid. 801(d)(2)(E) advisory committee note) and the Senate committee (see S. Rep. 93-1277, 93d Cong., 2d Sess. 26-27 (1974)) viewed this rule as a codification of federal laws as it had evolved in the courts.

not be interpreted in a way that would stultify this development. See, *e.g.*, *Ohio* v. *Roberts*, 448 U.S. at 64-65; *Dutton* v. *Evans*, 400 U.S. at 80, 86 n.17; *California* v. *Green*, 399 U.S. at 156; *id.* at 171-172 (Burger, C.J., concurring).

The review of hearsay exceptions under the Confrontation Clause would also be enormously disruptive. To take the Federal Rules of Evidence as an example, this Court has thus far addressed the constitutionality of only two of the 27 specific exceptions—former testimony and dying declarations. If each of the remaining 25 exceptions, as well as the exemptions in Rule 801, must now be reassessed under the Confrontation Clause, the mode of proof in federal trials will be thrown into doubt pending the outcome of this reassessment. And the same will be true of all of the state variations. This thought is particularly sobering in view of the many decisions, from *Reynolds* in 1879 to *Roberts* in 1980, that have been required to hammer out the constitutional constraints affecting the single hearsay exception for former testimony.

D. Even If The Federal Co-Conspirator Rule Is Reevaluated Under The Confrontation Clause, No Sound Constitutional Policy Justifies Striking Down The Settled Rule That Co-Conspirator Declarations Are Admissible Without Regard To The Availability Of The Declarant

The court of appeals held in this case that the government may not introduce a statement falling within the co-conspirator rule unless it also produces the declarant or shows that he is unavailable to testify (Pet. App. 12a). This rule would exact a grave toll on the resources of the criminal justice system and would create a serious potential for disruption of prosecutions without benefiting the defendant in any significant legitimate way and without serving the Confrontation Clause's "mission [of] advanc[ing] 'the accuracy of the truth-determining process in criminal trials.'" *Tennessee* v. *Street*, No. 83-2143 (May 13, 1985), slip op. 6, quoting *Dutton* v. *Evans*, 400 U.S. at 89.

In assessing the practical wisdom of the court of appeals' rule, several factors must be kept in mind. First, not every case in which the prosecution wishes to introduce co-conspirator declarations will be as geographically or temporally compact as this one or involve just a few readily identifiable and locatable declarants. In the prosecution of large-scale drug conspiracy or organized crime cases, there may be literally dozens of conspirators whose statements the prosecution proposes to introduce. The task of locating, bringing to court, and adjudicating the testimonial availability of all of these individuals (none of whom the parties have independently decided to call as witnesses) can be massive indeed, and it is required by the decision below in every case, even though the defendant is under no obligation to ask a single question of any of these declarants once the prosecution has produced them.

1. The unjustifiable costs associated with the court of appeals' rule take several forms:

a. The first type of cost arises from the duty to produce the declarant in the court or satisfactorily demonstrate his physical unavailability. Even with respect to those individuals whose identity and whereabouts are known at the time of trial, this can be a burdensome and expensive undertaking. To begin with, because the co-conspirator/declarants are participants in criminal activity, many of them will be incarcerated, sometimes in facilities far removed from the venue of the trial. The problems associated with the need to transport such individuals to and from the courtroom under guard are manifest.

Among those co-conspirator/declarants who are not in custody and have not agreed to be prosecution witnesses, many if not most will have little interest in assisting the government in discharging its burden of production—especially if they realize that their failure to appear in court may delay or disrupt the prosecution's case or even preclude the admission of statements damaging to the defendants. Many of these individuals may still be in

league with, or at least sympathetic to, the defendants who who are on trial; they may be relatives, close friends, or business associates. Even if not personally sympathetic, they may fear that their appearance in court would lead to retaliation. Consequently, what will frequently happen is just what happened here. The co-conspirator/declarant will not appear in court as requested, making various excuses such as "car problems," illness, or lapse of memory. Until the declarant has disobeyed a subpoena (and thus disrupted the trial proceedings on at least one occasion), there will be no cause for issuing a bench warrant; and until a warrant is issued, the government has no ability to compel the attendance of a balky witness.

The failure of a declarant like Lazaro in this case to appear in court as requested will cause very serious practical problems. If he is apparently only temporarily unreachable—because he purportedly "has gone fishing," or is visiting a distant relative or taking a short vacation, or simply hasn't shown up in court for reasons as yet undetermined—he may not be "unavailable" within the meaning of the court of appeals' rule (indeed, he probably would not be considered unavailable within the meaning of this Court's precedents if the purpose of the inquiry were to determine the propriety of using former testimony). In such circumstances, the government would have the task of quickly finding the individual and bringing him in. Failing that, the court would be forced to grant a continuance (especially undesirable where the jury is sequestered), exclude the co-conspirator's statements, or perhaps even declare a mistrial if the statements have been previously admitted subject to later production of the witness by the prosecution. Once it is commonly understood that the temporary disappearance of the declarant can have such consequences, the frequency of such occurrences is likely to increase dramatically.

b. Apart from the burdens and expenses of securing the physical presence in court of known and locatable co-

conspirator/declarants, the court of appeals' rule imposes heavy costs on both prosecutors and courts arising from the process of establishing that declarants who have not appeared or who refuse to testify are indeed unavailable.[34]

In many instances, the declarant will not be identified by the prosecution or will not be locatable at the time of trial. In such cases, it will presumably be the prosecution's obligation to show the investigative avenues it pursued to identify or locate the declarant, and this in turn will lead to litigation about whether other leads or investigative techniques were reasonably available that might have brought about production of the declarant in court. The burden of showing in such cases that the co-conspirator/declarant cannot be found will be an onerous one, especially in prosecutions involving large-scale conspiracies that have operated over a period of years. Consider for instance the situation in which a conspiratorial conversation recorded by electronic surveillance includes statements made by unidentified speakers or speakers identified only by their first names or by aliases. How far must the prosecution go in its efforts to identify and produce such persons? See *United States* v. *Ordonez*, 737 F.2d at 802 (government failed to make sufficient showing that unknown maker of entries in drug business's ledger was unavailable). Consider also the case of a known declarant who has disappeared between the time of indictment and trial. To what extent does the government's duty of production make it a guarantor of the individual's availability at trial?

The existence of these kinds of questions opens virtually unlimited vistas of trial and appellate litigation whenever the government fails to produce the co-conspirator/declarant in court.[35] But even when produced,

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[34] Because the co-conspirator rule is used so much more often than any of the hearsay exceptions contained in Fed. R. Evid. 804, the burden of showing unavailability would far exceed that for those situations in which such a showing is required by rule.

[35] This point is well illustrated by the disagreement between the majority and the dissent in *Ohio* v. *Roberts*, *supra*, on whether unavailability had been satisfactorily demonstrated.

the declarant is likely to refuse to testify, necessitating the conduct of a hearing to evaluate any claim of privilege or an adjudication of contempt before a valid finding of unavailability may be made.[36]

c. Finally, even when the prosecution has brought to court a declarant who is willing to or can be compelled to testify, it is not clear from the court of appeals' opinion that its obligations are satisfied. The court held that the co-conspirator must be "produce[d] * * * for cross-examination." Pet. App. 12a; see also *United States* v. *Caputo*, 758 F.2d 944, 952 (3d Cir. 1985). Does this mean that the prosecution must conduct a direct examination of a co-conspirator who may well be in the defense camp and whose anticipated testimony the prosecution

[36] The majority of co-conspirator/declarants are likely to have a Fifth Amendment privilege available to refuse to testify regarding the conspiracy in which they were involved and the statements made by them during its course. (Even if already convicted of an offense or offenses arising from the conspiracy, there will remain a risk—theoretical if not real—of prosecution for related offenses or for the same offenses by a different sovereign.) Unless they have already agreed to cooperate with the prosecution or the defense by testifying at trial (and the present issue does not concern such individuals), they are likely to invoke their privilege and to be in fact unavailable. Even where it is obvious that this is what will transpire, the court of appeals' decision appears to require bringing these individuals to court solely for the formality of having them claim their privilege before the judge.

The court of appeals thought this burden could be alleviated by allowing the assertion of the privilege by affidavit, as its amended opinion suggests (Pet. App. 18a). Many co-conspirator/declarants, however, will not obligingly sign these affidavits, perhaps requesting the appointment of counsel to advise them with respect to their obligation to be available to testify. In addition, it is far from clear that defendants can be required to accept such affidavits rather than having the court assess the claim of privilege in light of specific questions that the defendant might propound. See *Hoffman* v. *United States*, 341 U.S. 479 (1951); *United States* v. *Rodriguez*, 706 F.2d 31, 34, 37 (2d Cir. 1983); *United States* v. *Horton*, 629 F.2d 577, 579 (9th Cir. 1980); *United States* v. *Goodwin*, 625 F.2d 693, 701 (5th Cir. 1980); *United States* v. *Hodgson*, 492 F.2d 1175, 1177 (10th Cir. 1974).

does not believe is true? What questions must be asked? If the court of appeals' decision requires the prosecutor to do anything more than make the co-conspirator available to be called by the defense, it constitutes a severe intrusion upon prosecutorial prerogative.

2. If the substantial costs associated with locating, producing, and litigating at trial and on appeal the availability or unavailability of every co-conspirator/declarant were offset by real and substantial gains to the fairness and reliability of the criminal trial, perhaps it would be justified to hold that the broadly accepted rule of evidence that has evolved over the years to regulate the admission of co-conspirator declarations is so fundamentally flawed as to be unconstitutional. In point of fact, however, the rule announced by the court of appeals in this case is likely to be almost all cost and no benefit.

a. First, the requirement cannot be justified on the ground that it serves to limit admission of an inferior type of evidence. Unless the prosecution makes a blunder in jumping through the necessary hoops, the evidence will be admitted. If the declarant is available and is produced, his out-of-court statements (unlike prior testimony) are fully admissible under the court of appeals' holding. And if the declarant is unavailable and the government shows this in court, his out-of-court statements are likewise to be admitted.[37]

[37] If the court of appeals' rule were recast in the mold of Fed. R. Evid. 804 to prohibit the admission of co-conspirator statements unless the declarant is unavailable, the rule would be objectionable on other grounds. Unlike former testimony, statements made by a co-conspirator in furtherance of a conspiracy are not an inferior substitute for live testimony by the declarant, but have discrete and independent probative value. Between the time the statements are made and the time of the trial, the situation of the declarant will have necessarily undergone such a dramatic transformation that his testimony will inevitably be seen in a very different light. This will be so whether at the time of trial he is cooperating with government, is allied with the defendants (out of sympathy or fear), or occupies a less well-defined position. Thus, the rule requiring unavailability as a prerequisite for the admission of co-conspirator

b. Even though the evidence is admissible whether the declarant is unavailable or is produced, there will of course be some cases in which, like here, the prosecution fails to produce the declarant but also fails to demonstrate unavailability to the satisfaction of the trial court (leading, as discussed above, to continuance, exclusion of evidence, or mistrial) or to the satisfaction of the court of appeals (leading to reversal of the conviction). The possibility of such results will no doubt provide substantial incentives to prosecutors to do all in their power (at the cost of considerable drain on available investigative and prosecutive resources) to assure that co-conspirator/declarants are produced in court. But there is little basis for concluding that these added incentives to the prosecution will materially increase the number of co-conspirator/declarants who can actually be made available to testify; and to the extent some are made available who otherwise would not be, it is by no means clear that they would be called upon by the defense to give evidence. In other words, the new constitutional requirement created by the court of appeals cannot be justified on the basis that it will bring needed additional evidence before the trier of fact.

To begin with, if a declarant is slated to testify for either the prosecution or the defense independently of any rule relating to the admissibility of his out-of-court statements, the court of appeals' decision will not produce any additional evidence for consideration by the trier of fact. Accordingly, we deal here only with those declarants whom neither side wishes to call to the stand as part of its case. Here, for example, the defense did not

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statements, unlike the unavailability requirement applicable to former testimony, cannot be defended as a best evidence rule. Davenport, *The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis*, 85 Harv. L. Rev. 1378, 1403 (1972). Live testimony is different from but not necessarily better than statements made during the execution of the conspiracy.

subpoena the declarant Lazaro or make any other efforts to secure his presence in court.[38]

Despite the added incentives to produce non-witness/co-conspirator/declarants generated by the court of appeals' rule, we think it quite clear that their actual availability to give testimony will not be materially increased. Many of these individuals will not be locatable despite reasonable efforts to do so, and most of those produced in court will invoke the Fifth Amendment privilege (see note 40, *supra*).

But even as to those non-witness/declarants who can be produced in court and are willing to or can be compelled to give testimony, we seriously doubt whether the defense will actually wish to examine them. After all, these are potential witnesses whom the defense has not independently elected to call as part of its case. Many of them will be individuals whose present sympathies are in doubt and whose likely testimony cannot reliably be ascertained, making it too risky for either party to examine them. Others, if forced to testify, would give evidence favorable to the prosecution. And even as to those declarants who would be prepared to disavow the making of the declaration introduced by the prosecution, testify that it was a lie, or give it an exculpatory explanation, many of them would be subject to such devastating cross-examination by the prosecution that their testimony would be worthless or positively damaging to the defense. In the instant case, respondent's counsel, while demanding that the government prove Lazaro's unavailability (J.A. 17), was unwilling to commit herself to having him testify if available to do so (J.A. 18).

In general, if the defense would not call such an individual as part of its case (whether as a regular or a hostile witness), it is not all clear why the defense would wish to examine the individual if produced by the government pursuant to a Confrontation Clause obligation.

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[38] Moreover, if the defense had subpoenaed Lazaro, the case would be more properly analyzed under the Compulsory Process rather than the Confrontation Clause.

In any event, in those few cases in which (1) the witness is available to testify and (2) the defense actually wants to question him at trial, it will ordinarily be as easy for the defense to arrange for the declarant's appearance as for the prosecution to do so (as it would have been here). It simply makes no sense to allocate to the prosecution the burden of producing or proving the unavailability of *every* co-conspirator/declarant rather than simply requiring the defense to call as witnesses those very few who are in fact available and whose testimony the defense actually desires. In sum, we seriously doubt whether the court of appeals' rule, while gravely burdening the criminal process, will produce anything more than negligible benefits.

II. IF PROOF OF UNAVAILABILITY IS A PREREQUISITE FOR ADMISSION OF A CO-CONSPIRATOR STATEMENT, THE COURT OF APPEALS SHOULD HAVE ORDERED A REMAND HEARING TO DETERMINE THE QUESTION OF UNAVAILABILITY RATHER THAN ORDERING A NEW TRIAL

Even if the court of appeals were correct in holding that the government may not introduce a co-conspirator statement without producing the declarant or establishing that he is unavailable, the court erred in ordering a new trial without giving the government an opportunity on remand to prove unavailability. At trial, the district court admitted Lazaro's taped conversations without demanding proof of unavailability. Because of this ruling, proof of unavailability would have been superfluous; the government had already won the evidentiary contest. Accordingly, the government should not be penalized for failing to prove a point that, at the time of trial, it had no reason to prove.

Even more important, requiring a new trial without a remand hearing would gratuitously punish society and waste judicial and prosecutorial resources if, on a remand hearing, the government would be able to show that Lazaro was indeed unavailable. In such an event, his out-of-court statements were properly admitted and

there would be no need for a retrial. A retrial would be a wasteful and meaningless gesture because it would simply duplicate the first trial: the identical proof would be presented to a new jury. In the meantime, this unnecesasry replay of the first trial will preclude the judge and prosecutor from trying another case. Both society and other defendants will suffer from the delay of trials that had already been scheduled. See *United States* v. *Gibbs*, 739 F.2d 838, 857-858 (3d Cir. 1984) (en banc) (Seitz, J., dissenting).

This Court has repeatedly eschewed remedies that are more harsh than needed to correct the asserted error. See, *e.g.*, *United States* v. *Bagley*, No. 84-48 (July 2, 1985); *United States* v. *Hasting*, 461 U.S. 499 (1983); *United States* v. *Morrison*, 449 U.S. 361 (1981); *United States* v. *Blue*, 384 U.S. 251, 255 (1966). This Court has shown particular reluctance to grant relief where the asserted error has not diminished the reliability of the verdict. See *United States* v. *Leon*, No. 82-1771 (July 5, 1984), slip op. 7-9. In the present case, if Lazaro was in fact unavailable, and there was no Confrontation Clause violation, allowing the government to prove his unavailability after rather than before the out-of-court statements were introduced does not in any way reflect on the proof of respondent's guilt.

This Court has expressly recognized the advantage of remanding for a limited hearing that would give the trial court an opportunity to apply the correct law where the result of doing so might be to obviate the need for retrial of the entire case. Thus, in *Goldberg* v. *United States*, 425 U.S. 94 (1976), the Court remanded the case to the district court for a determination whether, under the correct standard, the particular writings in question qualified as Jencks Act material that the government should have produced. *Id.* at 111. In so doing, the Court stated (*id.* at 111-112 (footnote omitted)):

> [W]e do not think that this Court should vacate [petitioner's] conviction and order a new trial, since petitioner's rights can be fully protected by a remand

> to the trial court with direction to hold an inquiry consistent with this opinion. The District Court will supplement the record with findings and enter a new final judgment of conviction if the court concludes after the inquiry to reaffirm its denial of petitioner's [Jencks Act] motion. This procedure will preserve petitioner's opportunity to seek further appellate review on the augmented record. On the other hand, if the court concludes that the Government should have been required to deliver the material, or part of it, to petitioner, and that the error was not harmless, the District Court will vacate the judgment of conviction and accord petitioner a new trial.

See also, *e.g.*, *Walker* v. *Georgia*, No. 83-321 (May 21, 1984), slip op. 9-11; *United States* v. *Wade*, 388 U.S. 218, 242 (1967); *Jackson* v. *Denno*, 378 U.S. 368, 394 (1964); *Brady* v. *Maryland*, 373 U.S. 83, 88-91 (1963); *Campbell* v. *United States*, 365 U.S. 85, 98-99 (1961). The court of appeals should have followed the same procedure here.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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